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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. 339

HERMAN R. SLAKMAN,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, STATE OF FLORIDA

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PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, STATE OF FLORIDA

Herman R. Slakman, petitioner, prays that a writ of certiorari issue to review the judgment of the District Court of Appeal, Second District, State of Florida, entered in Case No. 68-289, on February 7, 1969.

Citations to Opinions Below

The judgment and sentence of the Criminal Court of Record of Polk County, Florida, entered June 19, 1968, (App. 1) is unreported. The opinion and judgment of the District Court of Appeal, Second District, State of Florida, (App. 2) is reported at 222 So.2d 221. The order of that Court denying rehearing (App. 3) is unreported. The order

of the Supreme Court of Florida granting petitioner's timely petition for writ of certiorari to the District Court of Appeal, Second District (App. 3), is unreported. The judgment of the Supreme Court of Florida, discharging the writ of certiorari as improvidently issued (App. 4), is also as yet unreported, as is the order of the Florida Supreme Court denying petitioner's petition for rehearing (App. 4).

Jurisdiction

The judgment of the District Court of Appeal, Second District, State of Florida, a court of final appellate jurisdiction in Florida, *Callender* v. *Florida*, 380 U.S. 519, 383 U.S. 270, was entered on February 7, 1969. Petitioner's timely petition for rehearing was denied March 7, 1969. Petitioner's timely application to the Supreme Court of Florida for writ of certiorari was initially granted (App. 3) but was then discharged on April 8, 1970 (App. 4). Petitioner's timely petition for rehearing in the Supreme Court of Florida was denied June 8, 1970 (App. 4). This Court's jurisdiction is invoked under Title 28, U.S.C., Section 1257(3).

Question Presented

Whether in petitioner's trial and conviction for arson, in allegedly procuring the burning of his store, petitioner's Fourteenth Amendment due process rights were vitiated by a courtroom identification by the confessed arsonist, who claimed to have met the "owner" briefly in the dark store but who initially described the "owner" in a way not resembling petitioner and to whom State investigators subsequently displayed petitioner's photograph to prepare the witness for the courtroom identification.

Constitutional Provisions Involved

This case involves an asserted right, privilege or immunity secured to petitioner by the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part," . . . nor shall any State deprive any person of . . . liberty . . . without due process of law . . . "

Statement of the Case

Petitioner Slakman, charged with having engaged co-defendants Bedami, Hernandez and Posey to burn the building occupied by petitioner's department store on June 30, 1966, was convicted in the Criminal Court of Record of Polk County, Florida, on the courtroom identification of two witnesses. Lawrence Posey, who long prior to petitioner's trial in March 1968 pleaded guilty to arson (Tr. 8),* testified that a person whom Posey never saw before or since the night of the fire admitted Posey and Hernandez to the store so that they might burn it, which he said they did (Tr. 23-47). At petitioner's trial Posey pointed out petitioner as the man who Posey claimed had admitted him to the store (Tr. 30). The other witness was Clark Stone, an apparently disinterested person who testified at petitioner's trial that, from a distance of 75 feet, he momentarily observed a man whom he identified as petitioner "come out the front door of his department store" at sometime after six-thirty in the evening (Tr. 49).

The courtroom identification of petitioner by the witnesses Posey and Stone evidently overcame, in the jury's delibera-

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*Agreeably to amended Rules 21 and 23 of the Rules of this Court (eff. July 1, 1970), petitioner has elected to file for initial perusal an abbreviated transcript of a portion of the certified record now lodged in the Supreme Court of Florida. References here are to that transcript.

tions, the substantial showing made by the defense that petitioner was elsewhere during a period embracing the times Posey and Stone testified they saw petitioner at the department store. [The testimony of these defense witnesses is excluded from the abbreviated transcript filed initially with this petition, but its general tenor and import is described by argument at Tr. 69-72.]

Long prior to petitioner's trial, Posey gave sworn and unsworn statements describing the person he said he met in the department store in a way completely inconsistent with petitioner's appearance (Tr. 16, 42, 43, 44). Later, after the investigation was complete and petitioner had been charged and was waiting trial, an investigator for the State displayed "a couple of photographs," including one of petitioner, to Posey and inquired of Posey, "which one was it and which one was Mr. Slakman" (Tr. 46).

After petitioner was found guilty by the jury but before he was adjudged guilty and sentenced, Posey recanted* under oath his courtroom identification of Slakman, saying that he had never seen Slakman before the trial and that his courtroom identification was predicated entirely on investigator Savage's display of petitioner's photograph in the company of Tampa police (Tr. 88, et seq.).

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*Posey's post-trial recantation was relied on in the State courts as an independent basis for a new trial. Though the transcript of his recantation was placed of record before the trial judge before he pronounced judgment and sentence, the Florida appellate court held that it was "not properly in the record-on-appeal now before us" (App. 2). The recantation is not referred to in this petition as an independent basis for exercising this Court's jurisdiction but rather for the limited purpose of showing the totality of the circumstances surrounding the courtroom identification.

The witness Stone, who testified positively at the trial that "I saw him come out the front door of his store" and that "it was Mr. Slakman" (Tr. 49, 50), admitted on cross-examination that the front door could not be seen from Stone's position and that he was unable to say, from his momentary glimpse of the individual in question, which way he was facing or "which way he went, . . . up, down, or anywhere-- he disappeared" (Tr. 52). Following the trial, Stone reconsidered his positive identification and the fleeting observation on which it was based, and gave a sworn statement to petitioner's attorneys retracting his identification testimony. Stone explained that he had assumed the person in question to be Slakman because Stone had first assumed that the person had come out the front door of Slakman's store (Tr. 67). Stone testified before the trial judge, in connection with petitioner's motion for new trial, that he, Stone, could not "in good conscience" adhere to the testimony he had given at petitioner's trial (Tr. 78-79).

The federal question here asserted was repeatedly raised in the courts below. When Posey was asked on direct examination to make his courtroom identification of petitioner, defense counsel objected generally that "it is not a fair identification in these circumstances," in which Posey was bound to identify petitioner by a process of eliminating known counsel (Tr. 30-31). Defense counsel did not then know that Posey had been shown petitioner's photograph prior to the trial. That fact was revealed during the State's redirect examination (Tr. 45) and it was further explored on recross. (Tr. 45-46). The next day defense counsel moved the trial court to strike from the evidence Posey's "testimony . . . with respect to purported identification of the defendant here in the courtroom as the person who admitted Mr. Posey and Mr. Hernandez into the store on the night of June 30, 1966"

on the grounds that Posey's prior description of the person in question was

> "so inconsistent with the appearance of the defendant as not to form any rational or reasonable basis for an identification in the courtroom"
>
> Tr. 53,

and on the ground that the courtroom identification was tainted by the highly suggestive pretrial photographic display (Tr. 54). Defense counsel explicitly asserted petitioner's constitutionally-protected right to due process of law and, in argument not contained in the abbreviated transcript here initially filed, relied on this Court's decisions in *United States* v. *Wade*, 388 U.S. 218, *Stovall* v. *Denno*, 388 U.S. 293 and *Gilbert* v. *California*, 388 U.S. 263. The trial court denied the motion to strike, holding that the "'sufficiency or insufficiency of testimony regarding identity of the defendant is one which properly would go to the jury" and that the motion to strike should have been made following the testimony of the witness, rather than on the following day after the State rested (Tr. 54).

Petitioner's motion for new trial asserted that the courtroom identification, under the circumstances, deprived petitioner of due process of law, secured to him by the United States Constitution (Tr. 58). That motion was denied (Tr. 80-81). Petitioner's assignments of error preserved the question (ground 33, Tr. 94) and the point was thoroughly brief and argued to the District Court of Appeal, Second District. Following the adverse decision of the District Court of Appeal, in which the point was not mentioned in the opinion (App. 2), petitioner asserted as one of the principal points in his petition to the Florida Supreme Court:

> "In an unnecessarily suggestive and proper manner,

Posey was shown 'a couple' of photographs by an investigator for the State shortly before petitioner's trial and was asked, 'Which one was it and which one was Mr. Slakman?,' in order to secure a courtroom identification of petitioner notwithstanding Posey's prior descriptions of his purported accomplice in a way inconsistent with petitioner's appearance [thereby depriving petitioner of a fair trial: *citing Wade, Stovall and Simmons*]."

Reasons for Granting the Writ

The three Florida courts, including particularly the District Court of Appeal, Second District, have decided a substantial federal question in a way not in accord with this Court's decisions in *United States* v. *Wade;* 388 U.S. 218, *Gilbert* v. *California,* 388 U.S. 263, *Stovall* v. *Denno,* 388 U.S. 293 and *Simmons* v. *United States,* 390 U.S. 377, which hold that an unfairly suggestive pretrial identification procedure, producing a courtroom identification not demonstrably predicated on an independent source, vitiates constitutionally protected rights in respect to due process of law.

Here the pretrial photographic display was conducted for no reason other than the preparation of the witness Posey for the courtroom identification at petitioner's trial. The display was highly suggestive. Investigator Savage displayed "a couple" of photographs to Posey and inquired "which one was it and which one was Mr. Slakman" (Tr. 46), thereby suggesting that the person in question was depicted in one or the other of the "couple" of photographs and that the person whose identification was desired was "Mr. Slakman." Investigator Savage testified in his pretrial deposition (again, before the display was conducted) that Posey never used the

name "Slakman" until he learned it from Savage (Tr. 17). Posey's susceptibility to Savage's wishes derived from the fact that Savage, identified as a Deputy Fire Marshall (Tr. 5), also investigated the fire in behalf of Slakman's insurance company, which through Savage paid Posey substantial amounts of money for his cooperation (Tr. 20-21).

Posey's courtroom identification could not have been based on a source of knowledge other than the photographic display unless, of course, it is assumed that Slakman *was* the person who admitted Posey and Hernandez into the store to accomplish the burning.

The very substantial doubt as to this possible source of identification knowledge is raised by the following circumstances: before inspecting petitioner's photograph, Posey identified the person in question as being "pretty fair complexioned" (Tr. 42) [petitioner's complexion was described at trial as "sallow" (Tr. 56)]; as not wearing glasses (Tr. 42) [whereas trial testimony showed that for "15 years or more" petitioner had worn glasses and "can't see beans" without them (Tr. 56-57)]; as appearing to be about 40 years of age (Tr. 16) [the investigator Savage, on careful observation, described petitioner as appearing to be about 50 to 55 (Tr. 19)]; as being "kind of full in the face. He wasn't slim" (Tr. 43) and, on another occasion, as "thin" (Tr. 16); as having eyebrows that "wasn't too dark and wasn't too heavy" (Tr. 43) [even Posey admitted at the trial that petitioner's eyebrows were in fact "pretty dark" (Tr. 43)]; and as wearing "a brown suit coat and brown pants" (Tr. 16, 44) [although it was shown at trial that petitioner "owns nothing in brown" and "has never worn brown" (Tr. 56)].

Posey's interest in accommodating Savage and the prosecutors with a courtroom identification of petitioner is shown

also by trial court's disposition of Posey's own case. While Posey denied at petitioner trial, in front of the trial judge and the prosecutor, that any one had "made any arrangements or deals with you for leniency to get that plea of guilty" from him (Tr. 37), the record of Posey's sentencing after petitioner's conviction discloses the following colloquy:

> "THE COURT: And at that time [Posey's arraignment on June 9, 1967] I think the record probably will show that no promises were made to you; but I would feel sure, not being there myself, that what was said was such as to indicate the Court would be lenient with you.
>
> "MR. POSEY: Yes, sir.
>
> "THE COURT: I don't know. And Mr. Posey was thereupon released on his own recognizance, apparently with no definite promises or commitments, but interpreting what had been said to the effect that the Court could be expected to be lenient.
>
> "Thereafter Mr. Posey did appear and testify in the two trials, one wherein Mr. Slakman was tried and one trial wherein Mr. Bedami and Mr. Hernandez were tried [which resulted in a mistrial upon the failure of the jury to agree on a verdict]."
>
> Tr. 100-101.

Posey, the confessed arsonist, was placed on probation. (Tr. 100). Hernandez was subsequently acquitted. Bedami was never retried.

Conclusion

Petitioner's conviction resulted from a pretrial photographic identification process that was highly suggestive, unnecessary for any purpose other than to prepare the witness for the courtroom identification, and wholly unjustified by the witness' prior description of the person in question. The courtroom identification deprived petitioner of his constitutionally-secured right to due process of law.

The writ of certiorari should be granted.

Respectfully submitted,

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July 1, 1970

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APPENDIX

JUDGMENT AND SENTENCE OF THE CRIMINAL COURT OF RECORD OF POLK COUNTY, FLORIDA

(entered June 19, 1968)

You, HERMAN R. SLACKMAN, being now before the court, attended by your attorneys Chester Bedell, and Robert Smith, and the Jury having rendered a verdict of guilty on March 8, A. D. 1968, of the offense of ARSON, and pursuant to a Motion for Judgment of Acquittal and Motion For New Trial having been denied on April 23, A. D. 1968, and pursuant to an Extraordinary Motion For New Trial having been denied on May 16th A.D. 1968. THEREFORE, the court adjudges that you are guilty of said offense for which you stand convicted by decision of the jury, and sentences you to be confined in the State Prison of Florida, at hard labor for a term of not less than Three (3) years, and not more than Five (5) years.

WHEREUPON, it is further Ordered by the Court that a Supersedeas Bond be set in this cause in the amount of $2,500.00.

DONE AND ORDERED in open court at Bartow, Florida, this the 19th day of June, 1968.

/s/ Thomas M. Langston
Judge

JUDGMENT OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, STATE OF FLORIDA

(entered February 7, 1969, reported at 222 So.2d 221)

PER CURIAM.

Appellant appeals from a judgment and sentence of the lower court in which he was found guilty of the crime of arson.

Appellant's main argument on appeal is that the evidence as to his identity is so unsatisfactory and inconsistent with established facts as to require an acquittal or at least a new trial. We have carefully reviewed the record-on-appeal and conclude that there is competent substantial evidence which accords with logic and reason contained therein to support the jury's finding of appellant's guilt.

The other points raised on appeal have been carefully considered and found to be without merit.

Much of appellant's brief is directed to an alleged recantation by a witness of his testimony. This is not properly in the record-on-appeal now before us. Nothing herein shall preclude the appellant from filing such petition as he may deem appropriate in the trial court.

Affirmed.

LILES, C.J., and HOBSON and MANN, JJ., CONCUR.

ORDER OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, STATE OF FLORIDA, ON APPELLANT SLAKMAN'S PETITION FOR REHEARING

(entered March 7, 1969)

The attorneys for Appellant have filed in this cause a Petition for Rehearing and, upon consideration, it is

ORDERED that the said Petition be and the same is hereby denied. It is further

ORDERED that the issuance of the Mandate in this cause be stayed for a period of fifteen (15) days from the date of this order.

ORDER OF SUPREME COURT OF FLORIDA GRANTING WRIT OF CERTIORARI TO REVIEW DECISION OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT

(entered June 20, 1969)

The Petition herein for a Writ of Certiorari to the District Court of Appeal, Second District of Florida, is granted.

It is further ordered that said cause be set down for oral argument at 9:30 o'clock A.M., Thursday, November 6, 1969 with not exceeding thirty minutes to the side.

The time for filing briefs on the merits is set forth in Rule 4.5 c (6), F.A.R.

JUDGMENT OF SUPREME COURT OF FLORIDA DISCHARGING WRIT OF CERTIORARI

(entered April 8, 1970)

PER CURIAM.

Writ of certiorari having heretofore issued, argument having been heard, and the court having examined the record and briefs, it appears that the writ was improvidently issued. Accordingly, the writ of certiorari heretofore issued in this cause is discharged.

It is so ordered.

ERVIN, C.J., ROBERTS, THORNAL, and CARLTON, JJ., and CREWS, Circuit Judge, concur

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ORDER OF SUPREME COURT OF FLORIDA ON PETITIONER SLAKMAN'S PETITION

(entered June 8, 1970)

On consideration of the Petition for Rehearing filed by Attorneys for Petitioner,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.

ORDER OF SUPREME COURT OF FLORIDA GRANTING STAY OF PROCEEDINGS TO AND INCLUDING JULY 10, 1970

(entered June 8, 1970)

Petitioner's motion for stay is granted and proceedings in this Court, the District Court of Appeal, Second District, and in the Criminal Court of Record of Polk County, Florida, are hereby stayed to and including July 10, 1970, to enable petitioner to seek review in the Supreme Court of the United States and obtain any further stay from that court.

Supreme Court, U.S.
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HERMAN R. SLAKMAN,

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vs.

STATE OF FLORIDA,

RESPONDENT.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

The State of Florida, Respondent, files this response as directed by this Court and moves that the writ of certiorari be denied.

QUESTION PRESENTED

The Respondent disagrees with the question presented by the Petitioner because said question assumes as fact that the identification witness gave an initial description "in a way not

resembling petitioner" and also assumes as fact that the photograph was displayed to the witness by investigators connected with the State for the purpose of preparing the witness for a courtroom identification. The foregoing assumptions of fact are not adequately supported by the record and the balance of the question leaves no possibility for argument to the contrary. Respondent suggests that the question presented is:

WHETHER, UNDER THE TOTALITY OF CIRCUMSTANCES, THE RECORD REVEALS A PRETRIAL IDENTIFICATION PROCEDURE WHICH WAS SO IMPERMISSIBLY SUGGESTIVE AS TO GIVE RISE TO A VERY SUBSTANTIAL LIKELIHOOD OF IRREPARABLE MISIDENTIFICATION.

STATEMENT OF THE CASE*

Lawrence Posey testified on behalf of the State and identified the Petitioner in court as the man who had admitted him, along with Hernandez, to the H & S Department Store in Lakeland, Florida. (Tr 28-30) Posey said he and Hernandez arrived there between 5:30 and 6 in the evening,

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*Respondent will refer to the abbreviated record filed by the Petitioner using the symbol Tr.

walked to the front door of the store building, knocked, and "a man came to the door and let us in." (Tr 30) Inside, the men went to the back of the store and a conversation ensued between Hernandez and Slakman. Slakman was afraid of something going wrong and kept asking if everything was going to be alright; Hernandez reassured Slakman that "we would take care of everything;" Slakman gave Hernandez a roll of money and a key and then left by the front door. (Tr 30, 31) Posey testified further that he was in the presence of Slakman for a period of 5 or 10 minutes; that although the light conditions in the store were "sort of dark," he could "see him pretty plain." (Tr 32). Sometime shortly after 9 o'clock, Posey and Hernandez doused the inside of the store with gasoline, rigged an ignition device, and left by the front door. (Tr 33-34) Posey walked around to the back door, ran the string from the ignition device up the alley which was located behind the store, and pulled the string. (Tr 35) A muffled explosion was heard; Posey and Hernandez walked to a waiting car driven by Bedami and departed (Tr 35, 36). The store was consumed by the explosive fire.

Corroborating this testimony was that of Clark Stone, a private investigator. On the night of the fire, Stone happened to be conducting a surveilance, and was sitting in his car outside the store from approximately 5:55 p.m. until 9:05 p.m., with the exception of 15 minutes between 6:45 and 7 p.m. Stone testified that he

knew the Petitioner Slakman and saw him come out the front door of his store some time after 6:30 p.m. (Tr 47-49)

On cross examination, Stone admitted that he could not positively say he could see the front door of the store, as the doors were recessed and from his position on the corner the front door was not visible. (Tr 52)

Stone testified at the hearing on Petitioner's motion for new trial as follows: (Tr 78)

"Q. So actually, you are not changing your testimony, are you, Mr. Stone? You still believe that it was Mr. Slakman but you are just saying you could be mistaken?

"A. I am saying I could be mistaken, yes, sir."

Attempting to save the situation, Petitioner's counsel asked on redirect:

"Q. Are you now willing to testify on oath, as you testified in this trial-- did you see Mr. Slakman on this particular evening, Mr. Stone" Answer: Yes, sir, yes, I did. Where did you see him? I saw him come out the front door of the store.

"A. I couldn't in good conscience make that statement, no." (Tr 78,79)

This question and answer is ambiguous and can easily be interpreted as a statement by Stone that the only thing that he could not in good conscience testify to was that he had seen the Petitioner "come out the front door of the store." This was consistent with his original testimony that he could not see the recessed front doors.

Furthermore, the sworn statement given by Stone to Petitioner's counsel after the trial contains the following:

"A. I saw a man--I saw a man in front of the H & S whom I just thought come out of the store and I couldn't be positive about that because, as you pointed out, the doors were recessed, and the man was slight built and I just had a few seconds glance at him. I don't know which way he turned on the sidewalk or where he went. I just thought in my mind it was Slakman.

"Q. Because of the fact he appeared to have come out of the store?

"A. That's right. That's correct." (Tr 67)

Although Petitioner was particularly anxious to elicit this explanation from Stone after the trial, almost identical testimony was blocked by the Petitioner's counsel during the trial. (Tr 49)

> "A. I saw him come out the front door of his department store. He was on the sidewalk, and I just thought in my mind--
>
> Mr. Smith: Excuse me. I object to what he thought in his mind--being incompetent, irrelevant, and immaterial."

Stone's testimony after the trial was therefore not significantly different from that which was, or could have been, brought out at trial. The net effect of the "retraction" was merely an admission by Stone that he could have been mistaken.

Posey's recantation alluded to by Petitioner was held "not properly in the record on appeal now before us" by the Second District Court of Appeal, Slakman v. State, 222 So. 2d 221. The Court also said that:

> "Nothing herein shall preclude the Appellant from filing such petition as he may determine appropriate in the trial court." Ibid.

Reference to that "recantation" is improper here for any purpose as it has never been considered by a state court.

ARGUMENT

Petitioner has failed to make a showing that his conviction resulted from the violation of any right guaranteed by the United States Constitution. United States v. Wade, 388 U. S. 218 (1967), and Gilbert v. California, 388 U. S. 263 (1967), relied on by Petitioner, are distinguishable from the case here involving photographs, just as this Court distinguished those decisions in Simmons v. United States, 390 U. S. 377 (1968), saying:

> "[T]his court first departed from the rule that the manner of an extra-judicial identification affects only the weight, not the admissability, of identification testimony at trial. The rationale of those cases was that an accused is entitled to counsel at any "critical stage of the prosecution," and that a post-indictment lineup is such a "critical stage." (Emphasis added) 390 U.S. at 382, 383.

The test to be applied here is whether, under the "totality of circumstances," the identification procedure revealed by the record constituted a violation of due process of law. Stovall v. Denno, 388 U. S. 293 (1967); compare U. S. v. Wade, supra and Gilbert v. California, supra, with Simmons v.United

States, supra. Specifically, as to photographs, this Court, in Simmons, held that:

> "Despite the hazards of initial identification by photograph, this procedure has been used widely and effectively in criminal law enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eye-witnesses to exonerate them through scrutiny of photographs. The danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error. We are unwilling to prohibit its employment, either in the exercise of our supervisory power or, still less, as a matter of constitutional requirement." (Emphasis added) 390 U.S. at 384.

While the burden is on the State to demonstrate that the defendant is represented by counsel at pretrial lineups, the burden of showing error because of an identification procedure involving photographs under the totality of circumstances is on the defendant. Simmons v. United States, supra. Simmons makes clear that dangers of photo-induced misidentification can be minimized by cross examination. Unlike lineups, photographic displays are capable of reconstruction

at trial and, therefore, the safeguard of cross examination is sufficient to expose flaws in the procedure.

The testimony at trial shows only that Posey said he was shown "a couple of pictures" and that Savage laid them down and asked him "which one was it and which one was Mr. Slakman." (Tr 46) This display took place at least three or four months prior to trial.

Petitioner's claim that the photographic display was suggestive is not supported by the record. In Simmons, this Court placed reliance on defense counsel to bring out any unfairness or unreliability in photographic identification. With this record so threadbare, Petitioner is apparently urging that any uncertainties as to the totality of circumstances are to be resolved against the State. Indirectly, this puts upon the prosecution the responsibility of cross examining its own witness, if, as here, the defense fails to do so.

Petitioner did not ask Posey or any other witness how many pictures were displayed, did not ask about the appearance of the other persons pictured, did not ask whether Posey had difficulty in making the identification and did not ask whether Savage indicated by word or action which picture was that of Slakman.

Moreover, Petitioner asserts conjecturely that Savage was an agent of the State when in fact Savage was employed

as an investigator for an insurance company. (Tr 14, 20-22) There is no testimony indicating that the prosecutor had any knowledge of this photographic identification. Accordingly, whatever Savage may have done on his own as an insurance investigator is not attributable to the State. Cf. Miller v. Pate, 386 U.S. 1 (1967); Alcorta v. Texas, 355 U.S. 28 (1957); Mooney v. Holohan, 295 U.S. 103 (1935).

Parenthetically, Respondent notes that the Petitioner could have utilized discovery by taking Posey's deposition prior to trial and determined whether any improper identification procedures had been used. See Florida Rules of Criminal Procedure 1.220(f). Or, if surprised at trial, Petitioner could have tried to elicit the facts out of the presence of the jury. See e.g. Clemmons v. United States, 408 F. 2d 1230 (DC Cir. 1968) cert denied 394 U.S. 964. Neither of these alternatives was attempted, and accordingly there is silence in the record. Petitioner should not be able to benefit from this silence since it was his responsibility to demonstrate the unfairness.

In short, the record does not show a suggestive photographic display. The record shows a suggestion about a display.

Petitioner claims that Posey's description of Slakman, as given to Savage, varied widely from Slakman's actual appearance. Many of the characteristics

are imprecise; "pretty fair complexioned" versus "sallow;" about "40 years of age" versus about "50 to 55;" eyebrows not "too dark" or "too heavy" versus "pretty dark." Other discrepancies are founded upon the testimony of Petitioner's own wife (hardly a neutral witness) that he could not see without glasses, and that he never wears brown. (Tr 56) The descriptions "kind of full in the face," and "not slim" are references to a statement read by Petitioner's counsel on cross examination of Posey, never introduced into evidence. These discrepancies are the natural, minor inaccuracies present in many descriptions. But Petitioner fails to mention that Posey also told Savage that the "owner" was a "short, thin ... small guy." (Tr 16) Significantly, Stone also described the man he saw and identified as Slakman as being "slightly built." (Tr 67). Thus Posey's description of Slakman was not as faulty as Petitioner contends.

The real question in this case is credibility of witnesses ; not constitutional error grounded upon pretrial identification

The record contains sufficient evidence for this Court to conclude that even if the identification procedure was suggestive, the in-court identification can stand because it had an independent origin. See United States v. Wade, supra. This independent origin is shown by Posey's testimony that he saw Slakman

in the store for 5 or 10 minutes on the night of the crime. This testimony is made believable because Stone corroborated the fact that Slakman came out of the store at approximately the time Posey said he did. Stone's identification is reliable because he knew Slakman and, therefore, his identification was not that of a stranger. Moreover, it must be assumed that Posey had identified Slakman from the pictures. There is no indication that he ever failed to identify Slakman or that he ever identified some other person. It must also be presumed that one purpose for showing Posey the pictures was to exonerate Slakman if Posey were unable to recognize him from the photographs. Cf. Stovall v. Denno, supra.

The only doubt cast upon the identification testimony of Posey and Stone comes from the purported retractions of those witnesses after the trial. Respondent submits that if any portion of this record is subject to doubt, it is those eleventh hour recantations.

CONCLUSION

Respondent urges that certiorari be denied because no constitutional issue is presented. Wade and Gilbert do not apply to this case. Stovall and Simmons have already established the principle that pretrial identification must be fair under the totality of circumstances.

This case could establish nothing further in the way of constitutional principles. And most importantly, the record does not show a commission of constitutional violation.

Respectfully submitted,

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PROOF OF SERVICE

This is to certify that I have served a copy of the foregoing Response to Petition for Writ of Certiorari, by mail, to Honorable Chester Bedell and Honorable Robert P. Smith, Jr., Counsel for Petitioner, 1520 Barnett Bank Building, Jacksonville, Florida 32202, this _____ day of October, 1970.

GEORGE R. GEORGIEFF
Assistant Attorney General

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In The Supreme Court of the United States

OCTOBER TERM, 1970

No. 339

HERMAN R. SLAKMAN,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

REPLY BRIEF

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In The
Supreme Court of the United States

OCTOBER TERM, 1970

No. 339

HERMAN R. SLAKMAN,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

REPLY BRIEF

The State asserts in its Response to the Petition for Writ of Certiorari that Mr. Savage, who showed Posey a picture of petitioner because Savage "wanted to know if I could identify him" (Tr. 46), was an investigator for an insurance company and was not "connected with the State for the purpose of preparing the witness for a courtroom identification" (State's Response, p. 2). On that premise the State contends that ". . . whatever Savage may have done on his own as an insurance investigator is not attributable to the State." (State's Response, p. 10.)

Savage was described at Posey's arraignment as "State Fire Marshall" (Tr. 6). In the Bill of Particulars the State gave

Posey's name and address as follows: "Lawrence Posey, c/o Mr. Jack Savage, Deputy Fire Marshal, St. Petersburg, Florida." (Tr. 5.) At the proceeding at which Posey was adjudged guilty, Savage brought Posey to Court (Tr. 100) and asked the Court to let Posey go on his own recognizance (Tr. 44). Savage brought Posey to the trial at which petitioner was convicted (Tr. 45).

Whether Savage was, in fact, the "State Fire Marshal" or a "Deputy Fire Marshal" is not material or decisive. The controlling fact is that the State accepted Savage's services in preparing Posey for his in-court identification of petitioner.

So it is immaterial, if true, that the prosecutor had no "knowledge of this photographic identification" (State's Response, p. 10). The prosecutor became aware of it when he elicited Posey's testimony on *redirect* and relied on it in obtaining petitioner's conviction.

The State, having committed Posey to Savage's care and having availed itself of Savage's preparation of Posey for the in-court identification, is in no position to now claim that Savage was not "connected with the State for the purpose of preparing the witness for a courtroom identification" (State's Response, p. 2).

The procedure employed by Savage in advance of the trial, adopted by the prosecutor at the trial and approved by the trial court and two Florida appellate courts, has effectively denied petitioner his right to due process of law guaranteed him by the Fourteenth Amendment.

Respectfully submitted,

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October 19, 1970

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In The
Supreme Court of the United States

OCTOBER TERM, 1970

No. 339

HERMAN R. SLAKMAN,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

PETITION FOR REHEARING

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In The
Supreme Court of the United States

OCTOBER TERM, 1970

No. 339

HERMAN R. SLAKMAN,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

PETITION FOR REHEARING

Herman R. Slakman, petitioner, pursuant to Rule 58 of the Rules of this Court, petitions the Court to grant a rehearing upon its order denying certiorari, entered November 9, 1970, and, in support of his petition, urges the following substantial ground which is available to petitioner although not previously presented:

Petitioner was deprived by the State of the effective assistance of counsel and of due process of law, in contravention of his rights under the Sixth and Fourteenth Amendments to the Constitution of the United States, by the action of investigators utilized by the State in arranging for the display of and displaying petitioner's photograph for identification purposes to the State's principal witness, in the absence of petitioner's counsel, after petitioner had been charged and was awaiting trial.

In support of his petition, petitioner shows:

1. In March 1968, petitioner was tried and convicted of the offense of arson. On direct examination by the Assistant County Solicitor, the witness Lawrence Posey, over objection, was asked to and did purportedly identify petitioner in the courtroom as the person who Posey said admitted him to the H & S Store on June 30, 1966, when Posey testified he set fire to the building. On redirect examination the Assistant County Solicitor elicited from Posey the testimony, then unknown and unanticipated by petitioner's counsel, that he, Posey, had recognized a photograph of petitioner which Posey said was exhibited to him by John J. Savage "three or four months ago, I guess" (trial transcript, p. 265). Petitioner's motion to strike the identification testimony of Posey from consideration by the jury was denied by the trial court. The exhibition of petitioner's photograph to Posey "three or four months" prior to petitioner's trial in March 1968, long after he had been charged in February 1967 (Tr. 1) and released on bond. The display was arranged and carried out in the Tampa police station, in the presence of Tampa police (Tr. 90), and in the absence of petitioner's counsel.

2. On June 18, 1968, Posey gave a sworn, transcribed statement in the presence of petitioner's counsel and counsel for other defendants, in which he stated:

"BY MR. SMITH:

"Q Did you know Mr. Slakman by sight at any time up until the time you identified him in this trial here before Judge Langston?

"A No, sir.

"Q Had you ever seen him before, to your knowledge?

"A No, sir.

"Q You had never seen him before, to your knowledge, prior to the day you testified here in March of 1968?

"A No, sir. The reason that I knew him then, well, I had seen pictures of him before -- before he went to trial.

"Q And where had you seen those pictures?

"A In Dallianno's office [at the Tampa police department].

"Q And who showed them to you?

"A Well, it was Sergeant Dallianno and Mr. Savage.

"Q Is that John Savage?

"A Yes, sir.

"Q And how many occasions did they show you photographs of Mr. Slakman?

"A Well, I had seen them a couple of times.

"Q But did you give a description to Sergeant Dallianno or to Mr. Savage or to both of them of the person who you said admitted you to the store?

"A I did give a description. Of course, about anybody would have fit the description that I gave because I didn't give a very clear description of him until after I seen his pictures I knew what he looked like."

Tr. 90, 92

3. As the record in this case shows, petitioner presented the transcript of Posey's statement to the trial court and requested the court's consideration of the transcript on the question of whether Posey's said testimony required a new trial (Tr. 82). The trial court nevertheless imposed judgment and an imprisonment sentence on petitioner on June 19, 1968 (Tr. 92) whereupon he appealed (Tr. 93). Thereafter, and before the Florida appellate court considered the merits of the appeal, petitioner requested of that court by appropriate motion that the case be temporarily remanded to the trial court for a determination of whether the contents of Posey's testimony of June 18, 1968, required that petitioner be granted a new trial. The Florida appellate court denied petitioner's motion. That court later declined to consider the contents of Posey's post-trial testimony for any purpose on the merits, and remitted petitioner to post-conviction remedies.

4. Petitioner has thus attempted with diligence to obtain an evidentiary hearing in Florida courts on the question of the efficacy of Posey's courtroom identification as it was affected and influenced by a photographic display conducted in the absence of petitioner's counsel. The effect of the judgment of which review is sought is to make final petitioner's conviction notwithstanding that the case involves substantial federal questions which ought to have been determined but were not determined by Florida courts before entering or affirming the judgment of conviction.

5. The photograph or photographs of petitioner which were displayed to the witness Posey are in the possession of State prosecuting authorities. Since the time of filing the petition for writ of certiorari, petitioner's counsel has attempted in vain, by the process of the Circuit Court of the Tenth Judicial Circuit of Florida, in and for Polk County, to have those photographs produced for his inspection. The

photographs thus remain in the State's possession and, to this point, beyond discovery and inspection by petitioner's counsel. The absence of petitioner's counsel at the pretrial photographic display was and continues to be critically prejudicial to petitioner, whom Florida has denied an evidentiary hearing except by post-conviction remedies available to those in custody.

6. The absence of petitioner's counsel at the pretrial photographic display was not separately urged to State courts as a ground for excluding Posey's courtroom identification. That ground is relied on as inhering in the ground that was raised, that the impermissibly suggestive photographic display deprived petitioner of a fair trial. *Gilbert* v. *California* (1967), 388 U.S. 263; *United States* v. *Zeiler* (3rd Cir. 1970), 427 F.2d 1305; *Pennsylvania* v. *Whiting* (1970), 439 Pa. 205, 266 A.2d 738, *cert. den.* (November 18, 1970), No. 586, Oct. Term, 1970, 8 Cr.L. 4054.

Respectfully submitted,

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For petitioner

Certificate of Compliance with Rule 58

I, ROBERT P. SMITH, JR., counsel of record for petitioner, do certify that the foregoing petition for rehearing is presented in good faith and not for delay and that the petition is restricted to a substantial ground available to petitioner although not previously presented.

ROBERT P. SMITH, JR.
Counsel of record for petitioner

Certificate of Service

I DO CERTIFY that three copies hereof were mailed at Jacksonville, Florida to the Hon. Earl Faircloth, Attorney General of Florida, The Capitol, Tallahassee, Florida, this December 3, 1970.

ROBERT P. SMITH, JR.
Counsel of record for petitioner